VERMONT SUPERIOR COURT
Rutland Unit
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CIVIL DIVISION
Case No. 20-CV-00573

Bradley Becker, Plaintiff v. OMYA, Inc., OMYA Industries, Inc., and Zinter, Handling, Inc., Defendants OMYA, Inc., Defendant/Third-Party Plaintiff, v. Rozell North, LLC, Third-Party Defendant	DECISION ON MOTION

RULING ON ROZELL'S MOTION FOR SUMMARY JUDGMENT

This is a personal injury case. Plaintiff Bradley Becker, who is an employee of Third-Party Defendant Rozell North, LLC, seeks to recover damages against Defendant/Third-Party Plaintiff Omya, Inc. and other defendants for injuries he sustained in a workplace accident that occurred in December 2017 while Becker was onsite at Omya's Vermont facility, performing a job on behalf of Rozell. Omya has asserted a claim for indemnification and breach of contract against Rozell, based on language in a purchase order for the job and a theory of implied indemnification. Rozell now moves for summary judgment, arguing that Omya's claims are barred by the terms of a Master Agreement the parties entered into in support of their ongoing business relationship in 2012. As discussed below, Rozell's motion is GRANTED.

Factual Background

Based on the parties' filings, the following facts are undisputed.[1] Omya is a large international corporation with an industrial plant in Florence, Vermont. Since 2012, Rozell has

[1] Omya did not submit a separate statement of disputed facts, as required by Rule 56(c), or respond to Rozell's statement of undisputed facts. *See* V.R.C.P. 56(c)(1). Accordingly, the facts alleged in Rozell's Statement of Undisputed Material Facts ("SUMF") are considered undisputed

performed various jobs for Omya as an independent contractor. In September 2012, as part of the onboarding process, Omya asked Rozell to sign a Master Agreement, which Omya had drafted. At the time, Omya was trying to get all its North American suppliers to sign similar master agreements. By its terms, the Master Agreement covers all transactions between the parties and supersedes other agreements between the parties when those agreements conflict. *See* Rozell's SUMF, filed Oct. 11, 2022, Ex. D, ¶¶ 1.1, 15.1. Specifically, paragraph 15.6 of the Agreement states: "The terms and conditions of this Agreement shall prevail, notwithstanding any variance with any purchase order or other written instrument submitted by either Party whether formally rejected by the other Party or not." *Id*. ¶ 15.6. Rozell signed the Master Agreement and returned it to Omya. Omya did not send a version to Rozell with Omya's signature. Since signing the Agreement, Rozell has performed over 200 jobs for Omya. In 2019, a cyberattack wiped out a large portion of Omya's database. As a result, the sole version of the Master Agreement available has only Rozell's signature.

The Master Agreement indemnification clause provides as follows:

> Each Party shall indemnify, defend and save the other Party, its officers, directors, employees and affiliates harmless from any loss, cost or expense claimed by third parties, *excluding employees of either Party*, for property damage and/or bodily injury, including death, to the proportionate extent such loss, cost or expense arising from the negligence or willful misconduct of the Indemnifying Party, its employees or affiliates in connection with the Services.

Id. ¶ 6 (emphasis added). The indemnification sought by Omya here relates to claims by Becker, Rozell's employee, for compensation for injuries he suffered arising from Omya's alleged negligence at the time of the injury. In addition, the Master Agreement can only be amended or rescinded in a writing signed by both parties. *See id*. ¶ 15.6 ("This Agreement may be modified only by amendment when signed by each Party."). The parties have not renegotiated, amended, or rescinded the Master Agreement at any point.

Apparently, Omya also maintains a separate set of terms and conditions on its website, which existed prior to the signing of the Master Agreement in 2012. In small print at the bottom of every Omya purchase order, including for the job at issue in this case, is a footer stating, "This Purchase order is governed by the Omya Terms & Conditions which are available at [weblink]." *Id*., Ex. G. The Internet link connects to a page titled "Omya Group Order Terms and Conditions." *Id*., Ex. E. The document contains an indemnification clause which provides that the Seller agrees to indemnify the Buyer (Omya). *Id*. ¶ 10. This clause differs from the Master Agreement because it does not exclude claims made by employees. Omya uses the same type of purchase order with each job where it contracts with a supplier, not only the jobs with Rozell.

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for purposes of the motion. *See* V.R.C.P. 56(e)(2); *Pettersen v. Monaghan Safar Ducham PLLC*, 2021 VT 16, ¶ 2 n.1, 214 Vt. 269 (where plaintiff did not respond to defendant's statement of facts or indicate which facts he disputed, but rather filed his own statement, the trial court appropriately "took defendant's facts as undisputed to the extent that they are supported by record evidence").

Discussion

Summary judgment shall be granted when the moving party shows that there is no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law. V.R.C.P. 56(a); *see Gallipo v. City of Rutland*, 163 Vt. 83, 86, 656 A.2d 635, 638 (1994). "The nonmoving party may survive the motion if it responds with specific facts raising a triable issue, and it is able to demonstrate sufficient evidence to support a prima facie case." *Kelly v. Univ. of Vt. Med. Ctr.*, 2022 VT 26, ¶ 15, 280 A.3d 366 (quotation omitted). In determining whether there is a disputed issue of material fact, courts "resolve all reasonable doubts and inferences . . . in favor of the nonmoving party." *Id*. (citation omitted). A party opposing summary judgment may not simply rely on allegations in the pleadings to establish a genuine issue of material fact. Instead, it must come forward with "specific facts that would justify submitting [its] claims to a factfinder." *Robertson v. Mylan Labs., Inc.*, 2004 VT 15, ¶ 15, 176 Vt. 356 (citation omitted). "[C]onclusory allegations without facts to support them are insufficient to survive summary judgment." *Id*. ¶ 48.

In its motion, Rozell contends Omya's indemnification and breach of contract claims are foreclosed by the terms of the Master Agreement. In response, Omya argues the Master Agreement "is not controlling because it was not signed by both parties," and therefore the indemnity clause in the Purchase Order applies. Thus, the Court must determine whether the Master Agreement controls the parties' relationship.

In order to form a contract, "[t]ypically, a party manifests its assent by signing an agreement." 17A Am. Jur 2d *Contracts* § 172. Except where a signature is an express condition of the agreement, "the absence of a party's signature does not necessarily destroy an otherwise valid contract." *Id*. Indeed, as the Vermont Supreme Court has long held, "a proposed contract drafted by one party is an offer which binds both parties when accepted by the signature of the other party, and the offeror cannot evade its terms by neglecting to affix his signature." *Monti v. Denton*, 133 Vt. 85, 87, 329 A.2d 646, 647 (1974) (citing *Norton & Lamphere Constr. Co. v. Blow & Cote, Inc.*, 123 Vt. 130, 134, 183 A.2d 230 (1962)).[2] Here, it is undisputed that, as a precursor to the business relationship, Omya drafted the Master Agreement and sent it to Rozell for its signature. Without making any changes or additions, Rozell promptly signed the contract and sent it back to Omya, who received it. Thereafter, Rozell performed over 200 jobs for Omya. Therefore, there can be no question that Omya is bound by the Master Agreement.

Omya's efforts to avoid this conclusion are unpersuasive. Omya argues the Master Agreement was merely "a starting point for the parties to begin negotiations." However, as detailed above, this assertion is contrary to the undisputed facts, which show that Omya sent the document to Rozell for its acceptance and signature, and Rozell complied. Nothing in Omya's communication to Rozell indicates that the Agreement would only become binding upon Omya's signature, nor does the communication invite comment or negotiation on the Agreement. *See* SUMF, Ex. C. Moreover, Omya's current expressions of its intent are immaterial. As the Court

[2] Paragraph 15.4 of the Master Agreement states it is governed by Ohio law. *See* SUMF, Ex. D, ¶ 15.4. However, neither party has argued that Ohio law differs materially from Vermont law or would compel a different result.

made clear in *Norton*, when a party sends a proposed contract to the other party, it makes an offer, which is accepted when the receiving party signs the proposed contract. *Norton*, 123 Vt. at 135. Thus here, when Omya sent the proposed contract to Rozell, it "made [Rozell] an offer. [Rozell], by signing the proposed contract, accepted the offer. The effect of the acceptance by [Rozell] was to make the offer into a binding contract between the parties." *Id*. The fact that Omya "believed that such contract would not be binding upon it without its signature is of no consequence." *Id*. Further, Omya's reliance on cases from Massachusetts, Illinois, Georgia, and the Second Circuit, which may have held that an insurance contract is binding only when both parties sign it, is misplaced. Those cases are not factually similar to the one at bar, and the courts do not apply Vermont law. *See, e.g.*, *10 Ellicott Square Ct. Corp. v. Mountain Valley Indem. Co.*, 634 F.3d 112, 121 (2d Cir. 2011) (upholding denial of coverage where insurance policy required that the underlying construction contract be "executed" before coverage would apply, and injury occurred before both parties had signed the agreement, because "New York law unambiguously requires either the signing of a contract or its full performance for it to be 'executed' within the meaning of an insurance policy requiring such prior execution").

Accordingly, the Court concludes that the Master Agreement constitutes a binding agreement between the parties. This is not quite the end of the analysis, however, because Omya also issued a Purchase Order for the project Rozell was performing when Becker was injured. Tellingly, Omya does not argue that the terms and conditions of the Purchase Order supersede the Master Agreement, nor could it credibly do so.

"The interpretation of a contract is a question of law unless the meaning of the contract is ambiguous." *Lundeau v. Peerless Ins. Co*., 170 Vt. 442, 445, 750 A.2d 1031, 1033-34 (2000). When interpreting a written instrument, the intent of the parties governs. *City of Newport v. Vill. of Derby Ctr.*, 2014 VT 108, ¶ 10, 197 Vt. 560. In determining the intent of the parties, the court "begin[s] with the plain language of the contract's provisions." *Id*. "Where the terms of a [contract] are plain and unambiguous, they will be given effect and enforced in accordance with their language." *Downtown Barre Dev. v. C&S Wholesale Grocers, Inc.*, 2004 VT 47, ¶ 8, 177 Vt. 70 (quotation omitted).

Here, the language of the Master Agreement is unambiguous, and expressly states that it controls in the event of a conflict with "any purchase order or other written instrument." SUMF, Ex. D, ¶ 15.8 ("The terms and conditions of this Agreement shall prevail, notwithstanding any variance with any purchase order or other written instrument submitted by either Party whether formally rejected by the other Party or not."). Further, the Master Agreement "may be modified only by amendment when signed by each Party." *Id*. We note that neither party has produced a "duly executed Work Authorization" for the project at issue (meaning a document describing the "Services to be performed, Consultant's [Rozell's] compensation, and the schedule for performance for each task" that is "valid and binding upon the Parties only if accepted in writing by Client [Omya] and Consultant"). *Id*. ¶ 1.1. However, if there were one, that document likewise would be "subject to the terms and conditions of [the Master] Agreement, except to the extent expressly modified by the Work Authorization." *Id*.

In short, the Master Agreement is binding, and its terms and conditions control the parties' business relationship for the December 2017 job performed by Rozell at Omya's

Florence, Vermont plant. Under the Agreement, Rozell is not required to indemnify Omya against this action by Becker for his injuries, because Becker was Rozell's employee at the time. Rozell is entitled to summary judgment on Omya's claims for contractual indemnification and breach of contract.

Finally, Omya's claim for implied indemnification against Rozell also cannot stand in light of the Master Agreement. The right to indemnification, which is an exception to Vermont's "longstanding rule barring contribution among joint tortfeasors," exists either "when one party has expressly agreed to indemnify another, or when the circumstances are such that the law will imply such an undertaking." *White v. Quechee Lakes Landowners' Ass'n*, 170 Vt. 25, 28-29, 742 A.2d 734, 736-37 (1999) (citations omitted). Implied indemnity is "imputed only when equitable considerations concerning the nature of the parties' obligations to one another or the significant difference in the kind or quality of their conduct demonstrate that it is fair to shift the entire loss occasioned by the injury from one party to another." *Id*. at 29 (citation omitted). Thus, "implied indemnification" is not appropriate unless "the indemnitee is vicariously or secondarily liable to a third person because of some legal relationship with that person or because of the indemnitee's failure to discover a dangerous condition caused by the act of the indemnitor, who is primarily responsible for the condition." *Id*.; *see also Bardwell Motor Inn, Inc. v. Accavallo*, 135 Vt. 571, 573, 381 A.2d 1061, 1062 (1977) (adopting *Restatement (1st) of Restitution* § 95 (1937)).

Here, the parties specifically addressed their right to seek indemnification from the other in the Master Agreement, and clearly excluded coverage for injuries to employees. Thus, the Court will not imply an obligation where the parties have expressly disclaimed it. *See, e.g.*, *Savage v. Walker*, 2009 VT 8, ¶ 9, 185 Vt. 603 (trial courts should "consider the totality of the circumstances" to determine if a party "is entitled to equitable relief"). Moreover, Omya has not come forward with *any* facts to support its claim for implied indemnity (for example, that it could only be vicariously liable for Becker's injuries or that it was entirely without fault in the creation of the conditions that caused his injuries), to show that it could succeed on the claim at trial. It is well settled that "mere conclusory allegations without facts to support them are insufficient to sustain a complaint for indemnity." *White*, 170 Vt. at 28 (quotation omitted); *see also Boyd v. State*, 2022 VT 12, ¶ 19, 275 A.3d 155 ("Where the moving party does not bear the burden of persuasion at trial, it may satisfy its burden of production by showing the court that there is an absence of evidence in the record to support the nonmoving party's case. The nonmoving party must then show that there are material facts in dispute." (quotation omitted)). Accordingly, Rozell is entitled to summary judgment on Omya's claims for implied indemnification and declaratory judgment.

Order

For the foregoing reasons, Third-Party Defendant Rozell North, LLC's Motion for Summary Judgment regarding the claims asserted by Defendant/Third-Party Plaintiff Omya, Inc. is GRANTED.

Electronically signed on February 15, 2023 at 6:06 PM pursuant to V.R.E.F. 9(d).

Megan J. Shafritz
Superior Court Judge